No. 89-990

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EXXON CORPORATION AND TEXACO INC.,
Petitioners,

v.

CITY OF LONG BEACH AND STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondents' strategy in opposition is to make this appear a fact-bound case and thus to avoid discussing the erroneous legal propositions relied upon by the Ninth Circuit. There is very little correspondence between respondents' opposition and the decision below. The opposition, far from defending the judgment and opinion of the Ninth Circuit, urges positions rejected by the court of appeals and disavows positions adopted by that court. Whatever else respondents' opposition does, it offers no reasons why this Court should not review the decision below.

Three points should be made at the outset.

(1) Respondents claim they introduced direct evidence of a conspiracy to depress the posted prices of crude oil.

Most of their opposition is devoted to an elaboration of that claim. But as both courts below found, there is no such evidence. The district court, after an exhaustive review of the record, found that respondents "have no direct evidence of such a conspiracy," App. C at 33a, and the Ninth Circuit confirmed that respondents have "provided no direct evidence [of] conspiracy." App. A at 11a. A petition for certiorari cannot be opposed on the ground that there really was evidence that the courts below found absent.

(2) Respondents argue that the agreement to revise the three-cut method of accounting for exchanges of crude oil was illegal *per se*. Both courts below carefully considered and explicitly rejected that argument. App. A at 9a; App. C at 48a-49a. Respondents' reassertion of this argument is a red herring: it confuses an acknowledged agreement concerning how firms account for exchanges *among themselves* with an unproved conspiracy to fix the wellhead prices paid to *third parties*. The agreement on three-cut exchanges is not the conspiracy to fix low posted prices by which respondents claim to have been injured. The "3-cut exchange agreement," Resp. 3, is merely one tile in the mosaic of circumstantial evidence by which respondents hope to induce a jury to find the existence of a conspiracy to depress prices at the wellhead.

(3) Respondents say we are wrong to suggest they relied upon the defunct doctrine of "conscious parallelism." Resp. 3. We did not make that suggestion. It was the Ninth Circuit that, despite this Court's teachings to the contrary in *Theatre Enterprises, Inc. v. Paramount Film Distribution Co.*, 346 U.S. 537 (1954), relied upon that doctrine, App. A at 13a—an inconvenient fact which respondents attempt to avoid by saying the court's opinion is "inartistic." Resp. 4. If this case goes back for trial, respondents will no doubt attempt to rely upon this "inartistic" ruling before the jury.

With these attempted obfuscations out of the way, it is clear that the actual issues are those stated in our petition. The importance of those issues to the administration of justice can hardly be overstated. If the Ninth Circuit's contravention of basic principles of law is allowed to stand, the result will not be confined to a flouting of the rules established by this Court and the creation of a conflict between the Circuits. The practical results will include a massive waste of increasingly scarce judicial resources as courts preside over weeks- or months-long jury trials that should never have occurred, the probability of great injustices to parties when complex cases that should not have been tried are presented to unsophisticated juries, and the deterrence of valuable and entirely legitimate business behavior.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT GOVERNING THE DISPOSITION OF ANTITRUST CONSPIRACY CASES ON SUMMARY JUDGMENT

We demonstrated in our petition that the Ninth Circuit committed major error by failing to consider the sufficiency of the evidence as it relates to Exxon and Texaco. Just such individualized consideration is required by *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). *See* Pet. 13. The court of appeals further ignored the holdings of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968), that an antitrust plaintiff may not reach the jury in a circumstantial case without having evidence that a defendant had a plausible economic motive to conspire—evidence, moreover, that tends to exclude the possibility of independent action. *See* Pet. 13-16. Instead, in clear defiance of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and notwithstanding the facial implausibility of respondents' claim that sellers conspired

to depress their own prices, the Ninth Circuit rested upon respondents' speculative "explanation" of what might have motivated Exxon and Texaco to conspire. *See* Pet. 16-18.

These errors of law are the issues this case presents. They are crucial issues and respondents apparently know it, for they employ two insidious tactics to hide those issues from this Court and to make it appear that there is evidence about petitioners Exxon and Texaco where there is not. We address those tactics lest there be any misapprehension that the judgment below rests upon evidence that the Ninth Circuit simply failed to discuss.

A. *Respondents use collective nouns and broad-sweeping assertions in an effort to obscure the insufficiency of the evidence as it relates to Exxon and Texaco.* The Ninth Circuit committed fundamental error by failing to consider the sufficiency of the evidence with respect to Exxon and Texaco, considered individually, as required by *United States Gypsum.* Respondents invite this Court to perpetuate that error. Throughout, respondents make blanket allegations using terms such as "they," "petitioners," "the pipeline club," and "the Majors" to refer indiscriminately to all defendants in situations where there is no evidence connecting either Exxon or Texaco to the matter at hand. The instances in which this device is used are too numerous for individual mention. But respondents' opening list of six items of purportedly "*direct* evidence," Resp. 2 (emphasis in original), provides a fair sampling.

(1) Respondents begin by asserting that "petitioners" were "the 'Majors', who together controlled the relevant market." Resp. 2. In fact, as respondents later acknowledge, Exxon and Texaco "had no means . . . to alter posted prices, which were set by pipeline owners who were net buyers." *Id.* at 16 n.61.

(2) Respondents refer to "secret 3-cut exchange formulae setting prices nearly $1 per barrel higher than

those they publicly announced ('posted') and paid to respondents and to other independent California producers." Resp. 3. But neither Exxon nor Texaco posted prices; to the contrary, Exxon and Texaco, like "respondents and . . . other independent California producers," were *selling* at the posted price. Pet. 4, 6.

(3) Respondents assert that "[t]he Majors' 3-cut exchange agreement had an immediate depressing effect on posted prices." Resp. 3. Exxon was not a party to this agreement. Pet. 20-21. If the agreement did have "an immediate depressing effect on posted prices," both Exxon and Texaco, as substantial sellers of crude oil at the posted price, were directly and immediately harmed.

(4) Respondents claim that "[t]he Majors . . . zealously adhered to a policy never to pay higher than posted prices . . . even when experiencing severe shortages of California crudes for their refineries." Resp. 3. Posted prices in fact were raised during the only two documented periods of general shortage. App. C at 35a, 41a-42a. Exxon avoided forecast shortages of crude oil by importing its own cheaper foreign crude; there is no evidence that Texaco ever experienced a shortage prior to the imposition of price controls. Pet. 22.

(5) Respondents allege that "[t]he Majors regularly shared advance pricing . . . information." Resp. 3. This refers to the innocent practice pursuant to which price posters, as a courtesy, would notify both buyers and sellers of previously determined changes in price postings. *See* App. C at 43a-44a. Exxon and Texaco were not price posters and thus did not "share[] advance pricing information;" like respondents themselves, Exxon and Texaco were simply advised of the prices being offered. Supp. ER 3974-75, 3213, 3216-18.

(6) Respondents claim that "[t]he Majors rigged the prices for Alaska [Cook Inlet] crudes in order to maintain the depressed prices for competing California crudes." Resp. 3. This claim is repeated several times.

See id. at i, 15, 25, 27. But there is no evidence that Exxon or Texaco ever posted prices for or otherwise participated in the pricing of Alaska Cook Inlet crude oil; and Texaco sold all of its Cook Inlet crude—amounting to millions of barrels—at the posted price. Supp. ER 2740.

The Ninth Circuit succumbed to respondents' tactic of guilt by collective noun. The court made no effort to undertake conscientious assessment of the sufficiency of the evidence with respect to Exxon and Texaco, individually considered. This was not just a matter, as respondents put it, of "not expound[ing] at length on the evidence linking Texaco and Exxon to the conspiracy." Resp. 27. The Ninth Circuit failed to expound at all, because there was no such evidence.

B. *Respondents' argument with respect to motive, as it relates to Exxon and Texaco, rests upon misstatement and conjecture.* Throughout the 1960s Exxon and Texaco were sellers of crude oil with strong economic interests in *high* prices. Pet. 5-7. Respondents themselves admit that "Texaco and Exxon did not initially derive . . . much benefit from depressed posted prices." Resp. 26. This admission is a model of understatement. It hardly captures the full flavor of the $65 million loss that Exxon would have suffered as a consequence of the conspiracy that respondents allege. *See* Pet. 15. Nor does it reflect respondents' explicit concessions below—concessions that respondents now wrongly deny making, Resp. 17—that Texaco would have benefitted from higher prices. ER 4111; Supp. 7R 79. The indisputable fact is that Exxon's and Texaco's participation in a conspiracy to fix *low* prices is facially implausible.

In such circumstances, "respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587. Respondents did not do so. They did not meet the minimum standard set by *Matsushita*: suf-

ficient evidence to support a rational jury finding that either Exxon or Texaco had a genuine motive to conspire. The Ninth Circuit, which incorrectly believed that *Matsushita* was restricted to cases of predatory pricing, App. A at 15a, implicitly recognized the absence of evidence when it relied not upon the record but upon respondents' mere "explanation of incentives to conspire." *Id.* at 14a.

In an effort to paper over this deficiency, respondents resort (as elsewhere in their opposition) to unsupported assertion and mischaracterization of the record. In the limited confines of a reply, it is possible to give only a few examples of this practice. Thus, respondents' record citations do not support their claims that "Texaco became a net purchaser of heavy crude before completing the modernization of its Wilmington refinery in 1967," Resp. 17; that "Texaco decided to modernize its refinery by 1962" and "expected large profits from its investment which depended on continued maintenance of low heavy crude prices," *id.* at 18; and that Exxon "knew that posted prices for crude were below market value" and had been told that "pipeline club members refused to trade crudes of unequal quality on a posted price basis." *Id.* at 20.

In the end, as in the courts below, respondents fall back upon sheer conjecture concerning "access to pipelines and long term refining plans." App. A at 14a. Their central allegations are that "Texaco and Exxon had developed refining plans to run heavy crude oils based upon the expectation that heavy crude posted prices would continue to be depressed," Resp. 16, and that "their long-range plans were based on continued underpricing of heavy crude." *Id.* at 26. But respondents cite no evidence in support of these assertions, and there is none.

Respondents further note "the critical importance to those petitioners of pipeline access." Resp. 27. Of course

access to pipelines was important. But there is no evidence whatsoever that pipeline owners, by threat or otherwise, coerced Exxon and Texaco to join a conspiracy to depress the price of crude oil. The absence of such evidence is fatal to respondents' theory of motive. *See* Pet. 17.

Respondents contend that arguments about the absence of supportive evidence "are properly directed to a jury," Resp. 17, and, indeed, "might persuade a jury." *Id.* at 20. But that gets the matter precisely backwards. The decision below subverts the summary judgment process and eviscerates the *Matsushita* requirement of motive by permitting respondents to go before a jury on the basis of mere conjecture about motive "and the hope that something further can be developed at trial." App. C at 33a, quoting *Weit v. Continental Ill. Nat'l Bank*, 641 F.2d 457, 462 (7th Cir. 1981).

* * * *

We have demonstrated respondents' misstatements of the record regarding Exxon and Texaco only to dispel the false impression that there is evidence linking these petitioners to the alleged conspiracy. While such evidence is indeed lacking, the point of the petition is the Ninth Circuit's serious and multiple departures from settled legal doctrine in (1) failing to give Exxon and Texaco the individualized consideration required by *United States Gypsum*, (2) failing to require evidence that these petitioners had a motive to depress their own selling prices, as required by *Matsushita* and *Cities Service*, (3) accepting arguments instead of evidence on the question of motive, contrary to *Celotex* and *Liberty Lobby*, and (4) ruling, contrary to *Theatre Enterprises*, that respondents could prevail on the long-discredited theory of conscious parallelism.

These are not factual but legal issues. Under the erroneous notions of law laid down by the court of appeals it is difficult to see how any defendant in an antitrust conspiracy case could ever obtain summary judgment. Taking these errors in combination with the court's adoption of "conscious parallelism," it will be an uphill struggle for even the most innocent defendant to prevail at trial.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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